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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL EDWARD SPILKER, Defendant and Appellant.	E069314 (Super.Ct.No. SWF1700011) OPINION

APPEAL from the Superior Court of Riverside County. John M. Monterosso, Judge. Affirmed in part; reversed in part with directions.

Denise M. Rudasill, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Kathryn Kirschbaum, Seth M. Friedman, Nora S. Weyl and Christopher Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Michael Edward Spilker took a flashlight from the shelf at a Kohl's Department store (store), secreted it in his shorts and exited the store without paying for it. The store security guard confronted defendant outside the store and he ran. During the chase, defendant pushed the security guard. The security guard tackled defendant and defendant bit him. Although the flashlight was not immediately found on defendant, he later returned it to the store.

Defendant was convicted of robbery (Pen. Code, § 211). In addition, in a bifurcated proceeding, defendant admitted he had suffered one prior serious and violent felony offense (§§ 667, subds. (a), (c) & (e)(2)), 1170.12, subd. (c)(2)(a)) and served one prior prison term (§ 667.5, subd. (b)). Defendant was sentenced to nine years in state prison.

Defendant makes the following claims on appeal:

1. The trial court erred and violated his federal Constitutional right to due process by failing to properly respond to a jury question during deliberations.

2. The trial court erred and violated his federal Constitutional rights to due process and a fair trial by failing to sua sponte instruct the jury on actual self-defense.

3. Cumulative error warrants reversal.

4. The case should be remanded to the trial court for resentencing in light of Senate Bill No. 1393 (Stats. 2018, Ch. 1013) (S.B. 1393).

We will order remand to the trial court for it to exercise its discretion to strike the section 667, subdivision (a) serious prior felony conviction. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Andrew Brown worked as a loss prevention officer at the store in November 2016. He was responsible for preventing theft from the store. The store used closed circuit television (CCTV) to surveil the inside of the store. It could be viewed live and was also recorded.

On November 18, Brown, while monitoring the CCTV from his security office, observed defendant in the store. Defendant quickly grabbed a baton flashlight from a shelf in the store and then walked away. The flashlight was about two feet long. Through the CCTV, Brown observed defendant walk into another area of the store, remove the packaging, hide the packaging behind some other items, and secrete the flashlight on his person. The jury was shown the surveillance video from the store. It showed, as Brown described, that defendant took the flashlight from the shelf and entered another area of the store. He appears to secrete something behind another object but it does not actually depict the flashlight being put in his shorts.

Brown called the police. Brown followed defendant past the registers where he could have paid for the flashlight. Defendant walked out of the store; Brown followed him. When defendant was about five feet outside the store, Brown advised him of his name; that he was the loss prevention officer employed by the store; and asked to speak with defendant about some merchandise. Defendant started to run. Brown had no physical contact with defendant before defendant started to run.

Brown ran after defendant. Brown caught up with defendant. Defendant pushed Brown away with his left hand on Brown's right shoulder. Brown had not touched

defendant prior to defendant pushing him. Brown stumbled but did not fall down. Brown regained his balance. He then was able to tackle defendant to the ground. While he was holding defendant on the ground, defendant bit him on the arm.

Brown was wearing a sweatshirt. The sweatshirt was cut by defendant's teeth. He had a cut on his wrist where he was bit; a scar remained. He also got scrapes on his right arm from hitting the asphalt when he brought defendant to the ground.

Defendant calmed down and cooperated with Brown. Brown escorted defendant back inside the store. Defendant claimed he lost the flashlight during the scuffle. Brown had not seen the flashlight in the area outside where he tackled defendant. Defendant's lip was bleeding. When they returned to Brown's office inside the store, Brown did not observe a bulge at defendant's waistband where he believed the flashlight was hidden; Brown had defendant empty his two front pockets. Brown was not allowed to "pat down" defendant.

Brown let defendant leave but recorded him leaving the store. While Brown was recording defendant, he observed him get into a car and remove the baton flashlight from his pants. The jury was shown a still photograph from the video surveillance, which highlighted defendant holding a long dark object that appeared to be the stolen flashlight.

Brown contacted sheriff's dispatch. He gave the dispatcher defendant's license plate number. Brown claimed he found heroin on defendant and saw stolen merchandise in a bag carried by defendant's companion. Brown advised the dispatcher that he had tackled defendant in the parking lot. Brown stated that defendant tried to fight him and

that defendant bit him on the wrist. He did not tell the dispatcher he had already called for the police and they did not show up.

Riverside County Sheriff's Deputy Ben Difani responded to the store. He spoke with Brown. Deputy Difani ran the license plate from the car in which defendant left the vicinity of the store, and obtained an address. Deputy Difani went to the residence and told the person he spoke with he needed to speak with defendant. He left his business card. Sometime later, defendant brought the flashlight back to the store and asked that Brown not call the police. He gave Brown Deputy Difani's business card. Brown estimated at trial that the flashlight was worth $30.

Brown insisted he did not initiate the physical contact with defendant. His goal in tackling defendant was to get the merchandise back. The struggle lasted for only about 30 seconds. If defendant had not first pushed him, he would not have tackled defendant. Brown was trained that he was not to initiate physical contact with a person taking items from the store.

Brown admitted that the store put pressure on him to get back merchandise from suspects. Brown did not find any heroin on defendant; he assumed defendant had heroin on him because he saw that defendant had track marks.

In his defense, defendant presented evidence that there was no record of the first call to 911 as testified to by Brown.

DISCUSSION

A. RESPONSE TO JURY QUESTION

Defendant contends the trial court erred and violated his federal Constitutional right to due process by improperly responding to a jury question regarding the use of force by Brown and defendant.

1. *ADDITIONAL FACTUAL HISTORY*

The jury was instructed with CALCRIM No. 1600 on robbery. This included the elements of robbery that (1) defendant took property that was not his own; (2) the property was taken from the other person; (3) the property was on his person or in his immediate presence; (4) the property was taken against the person's will; (5) the defendant used force or fear to take the property or to prevent that person from resisting; and; (6) "When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently." The instruction also included language "The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using force or fear, then he did not commit robbery." It also provided, "The act of taking property continues while the perpetrator carries the property away until he reaches a place of temporary safety. [¶] A robbery may be accomplished if force or fear is used during the act of carrying away the property. If you find the defendant used force, but that the property was abandoned prior to the use of that force, the defendant is not guilty of robbery."

In closing argument, the prosecutor argued that when defendant pushed Brown, at that point, defendant used force to try and get away with the property, making him guilty of the crime of robbery. In response, defense counsel argued that Brown never saw defendant take the flashlight and put it in his pants. Brown lied about initially calling the police. Also, defendant's counsel asked the jury to conclude that Brown was lying about getting bit on the arm. The tear on the sweatshirt did not resemble a bite. Brown also lied about the heroin. Further, the jury was asked to conclude that Brown lied about defendant pushing him.

During deliberations, the jury asked: "CALCRIM 1600 #5. [¶] Does defendant have to initiate the force? [¶] In other words is it important if the defendant pushed Andrew first or if Andrew tackled him first." The trial court asked the parties how it should respond. The prosecutor was not sure what would be the proper neutral response. Defendant's counsel responded, "Well, the second extension seems to be—they might be a little confused, because, if they don't believe the push, then the tackle by the victim is not force. I don't think that initiates the robbery, so I don't know how to handle that other than to just reread 1600, maybe." The trial court initially planned to just refer them to CALCRIM No. 1600 and element 5 of the instruction—which stated that the defendant had to use force or fear to take the property or to prevent the person from resisting—but realized that the jury had asked for a clarification of these instructions.

In response to the prosecutor's statement that there was no requirement that one party initiate or not initiate force, the trial court responded, "But I think it's fair for the jury, . . . that, if they find it was Mr. Brown that initiated the force, that is something they

can give great weight to [] contradict the People's theory that the defendant used force in kind to effectuate the robbery. . . . I think the jury has the ability to consider that." Again, defendant's counsel stated that he thought the best course of action was to refer the jury back to CALCRIM No. 1600.

The trial court then stated that it could simply advise the jury that it must determine "if the defendant used force, and, if so, at the time he used force, what was his intent." The trial court felt it was a correct statement of the law. Defense counsel responded that he did not think that was the jurors' question. Defense counsel stated, "I think they are already thinking somewhere along the line there is force." The trial court did not want to advise the jurors that there was force because that was a jury determination. Defense counsel stated his belief that the jury already found there was force but were confused as to the timeline.

The trial court stated it could add to the response, "your finding on who the initiator of force is [] evidence you can consider and give whatever weight you think appropriate." Defense counsel wanted the trial court to add, "In determining whether or not there was a robbery." The trial court responded, "I don't even think I need to go that far" and defendant's counsel responded, "Okay. I'm sure that's what they want to know."

The trial court explained its thinking on the response. "I think the right answer is that it's up to them to determine whether that's an important fact and give it whatever weight they think they deem appropriate. [¶] Factually speaking, who initiated force can make it have an impact on what their decision on what the defendant's intent was.

Legally, I don't think it makes a difference, but it does make a difference factually. For—if Mr. Brown initiated the force, that finding would tend to show that the defendant's reply with force was not designed to complete a robbery. If it was the defendant that initiated the force, that evidence would tend to suggest that the defendant was using the force to complete the robbery, so it's up to the jury." Defense counsel asked the trial court to instruct the jury with this above statement.

The trial court agreed it would give the specific statement if agreed to by both parties. The prosecutor felt that a more vague instruction was proper because it was up to the jury to give whatever weight to who initiated the force. The trial court also felt more comfortable with a more vague instruction.

The trial court proposed the following instruction: "Your finding about who initiated force is evidence you may consider when reaching your verdict. The significance and weight to give this evidence is for the jury to decide." The prosecutor agreed with the response. Defense counsel again asked the trial court to give the entire statement set forth *ante*.

The trial court offered the following response: "The jury must determine if the defendant used force, and, if so, at the time he used force, what was his intent. Your finding about who initiated the force is evidence you may consider when reaching your verdict. The significance and weight to give this evidence is for the jury to decide." Defense counsel had no further comment. That response was given to the jury.

2. *ANALYSIS*

Defendant claims on appeal that "the trial court's response to the jury's question did not address the jury's inquiry regarding the legal impact of appellant's failure to push Mr. Brown before Mr. Brown tackled him and the relationship of that conduct to the required use of force." He insists the trial court should have instructed the jury " '[I]f Mr. Brown (the store loss prevention officer) initiated the force, that finding would tend to show that the defendant's reply with force was not designed to complete a robbery. If it was the defendant that initiated the force, that evidence would tend to suggest that the defendant was using the force to complete the robbery.' " Defendant further insists the clarification given by the trial court lessened the prosecution's burden of proof as to the intent of robbery in violation of his federal Constitutional rights to due process.

"When a jury asks a question after retiring for deliberation, '[s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law.' [Citation.] But '[t]his does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information.' " (*People v. Eid* (2010) 187 Cal.App.4th 859, 881-882; see also *People v. Williams* (2015) 61 Cal.4th 1244, 1267; *People v. Hodges* (2013) 213 Cal.App.4th 531, 539.) "Indeed, comments diverging from the standard are often risky." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

We review for an abuse of discretion any error under section 1138. (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746; *People v. Eid, supra*, 187 Cal.App.4th at p. 882.)

Initially, the trial court determined that responding to the juror's question only required a reference back to CALCRIM No. 1600. However, it then recognized that the jury had questions about the instruction. "Section 1138 cast upon the court a ' "mandatory duty" ' to 'clear up' the jury's understanding. " (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1047.) The trial court did not abuse its discretion by determining it should provide further clarification.

The jury's question appears to be a request for further clarification of the time of use of force in relation to a finding of an intent to commit robbery. It does not, as argued by defendant, show that it necessarily rejected Brown's testimony in total. The jury was given CALCRIM No. 1600, which set forth the elements of robbery. Further, they were instructed on the theory of robbery as a continuing offense. Robbery is a continuing offense that lasts from the time of the original taking until the defendant reaches a place of relative safety. (*People v. Estes* (1983) 147 Cal.App.3d 23, 28.) "[D]eprivation of property occurs whether a perpetrator relies on force or fear to gain possession or to maintain possession against a victim who encounters him for the first time as he carries away the loot." (*People v. Gomez* (2008) 43 Cal.4th 249, 265.) In other words, "[w]hether defendant used force to gain original possession of the property or to resist attempts to retake the stolen property," such acts of force support a conviction of robbery. (*Estes*, at p. 28.) As set forth *ante*, the jury was instructed in conformance with *Estes*.

The trial court's response was legally correct. Defendant does not argue otherwise. The jurors were advised that they must first determine if defendant used force. It then was advised that it must determine defendant's intent at the time force was used. It was further advised that who initiated the force was evidence that it may consider when reaching the verdict. This clarification cannot be considered in isolation. The jury had already been instructed with CALCRIM No. 1600, that when defendant used force or fear to take the property, he intended to deprive the owner of the property permanently. Further, the jurors were also instructed that defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using force or fear, then he did not commit robbery. The clarification, in combination with the initial instructions, advised the jurors that if they found that, at the time defendant used force against Brown, he did so to retain possession of the flashlight, e.g. possessing the intent to permanently deprive Brown of the flashlight, and not due to some other intent such as a response to Brown's tackling him, they could find defendant guilty of robbery. The jurors also could consider who initiated the force as the trial court advised it could give that fact whatever weight it felt appropriate, which include that they could find that defendant did not use force with the intent to take the flashlight, but rather in response to Brown tackling him. Jury instructions must be considered as a whole. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013.)

Defendant insists that the trial court had to respond that if the jury found defendant pushed Brown first, it could consider the evidence tending to show that defendant was

using that force to effectuate a robbery; and if it found defendant did not push Brown before Brown tackled defendant, that it could consider this evidence tending to show defendant's use of force was not intended to complete a robbery. We do not see how this additional instruction would have provided more clarification of the issue than that already included in the instructions and the trial court's response to the jury's inquiry.

The jury was advised that they had to determine if defendant used force, what his intent was when he used that force, and that it could give whatever weight it felt to who initiated the force. The jury necessarily had to conclude, based on the instructions, that defendant used force against Brown. It also had to necessarily conclude that at the time defendant used force, he had the intent to deprive Brown of the flashlight. If the jury found that defendant did not initially push Brown, it could have found defendant not guilty because he did not use force. Further, if the jury found that Brown initiated the force by tackling defendant, it could have concluded, based on the instructions, that the act of defendant biting Brown constituted force. Moreover, if the jury found that Brown did not use force to complete the robbery, it could have found him not guilty. Nothing in the additional instructions proffered by defendant changes these findings. The clarification and instructions allowed the jury to consider all of these possibilities and the jury expressed no further confusion. The jury was properly instructed.

Moreover, we do not see how the trial court's response to the jury lessened the prosecution's burden of proof in violation of defendant's federal Constitutional rights. A failure to instruct on all elements of an offense is a constitutional error. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 198-199.) Based on the entirety of the instructions, along

with the response, the jury still had to decide whether defendant used force; and if it did conclude that he used force, that he had the intent to commit force in order to effectuate the taking of the flashlight. We do not see how the trial court's clarification of the already complete instructions lessened the burden of proof or eliminated an element of the offense.

We also conclude that defendant has not shown prejudice. "A court's failure under . . . section 1138 to adequately answer a jury's question 'is subject to the prejudice standard of *People v. Watson* [(1956)] 46 Cal.2d 818, 836 . . . ,' i.e., whether the error resulted in a reasonable probability of a less favorable outcome." (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1017; see also *People v. Hodges*, *supra*, 213 Cal.App.4th at p. 539.) Defendant insists that review is under the beyond the reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24, however we have already rejected that there was a violation of his federal Constitutional rights occasioned by the trial court's response.

Defendant insists that he would have received a more favorable verdict because the jury "doubted" the credibility of Brown's testimony that defendant pushed him and that defendant bit him after Brown tackled him. Brown was the only witness who testified to the events, and he had injuries that were shown to the jury. The jury did not indicate it doubted the entire testimony of Brown, only whether it was important to conclude that defendant first pushed Brown before Brown tackled defendant. There was strong evidence that defendant bit Brown, which would support Brown's use of force to retain possession of the flashlight. The jury necessarily found defendant had used force

during the robbery. The jury was instructed on the lesser offense of petty theft, which did not require a finding of use of force or fear. The jury necessarily found that defendant used some force against Brown to obtain the flashlight, by failing to conclude defendant only committed petty theft. Any conceivable error was harmless.

B. SELF-DEFENSE INSTRUCTION

Defendant contends the trial court had a sua sponte duty to instruct the jury on lawful self-defense. If this court concludes that the trial court did not have a sua sponte duty to give the instruction, the failure of his counsel to request the instruction constituted ineffective assistance of counsel. Moreover, the failure to so instruct the jury was error and violated his federal Constitutional rights to due process and a fair trial.

Defendant did not request any instructions on self-defense. Self-defense requires an actual and reasonable belief in the need to defend against an imminent danger of death or great bodily injury. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.)

"A trial court must instruct the jury sua sponte on general principles of law applicable to the case. [Citation.] . . . A trial court is required to instruct sua sponte on any defense, including self-defense, only when there is substantial evidence supporting the defense, and the defendant is either relying on the defense or the defense is not inconsistent with the defendant's theory of the case. [Citation.] If the defense is supported by the evidence but is inconsistent with defendant's theory of the case, the trial court should instruct on the defense only if the defendant wishes the court to do so." (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.)

Section 490.5, subdivision (f) provides for a merchant's right to detain an individual suspected of shoplifting: "A merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the merchant has probable cause to believe the person to be detained is attempting to unlawfully take or has unlawfully taken merchandise from the merchant's premises." (§ 490.5, subd. (f)(1).) "In making the detention a merchant . . . may use a reasonable amount of nondeadly force necessary to protect himself or herself and to prevent escape of the person detained or the loss of tangible or intangible property." (*Id.*, subd. (f)(2).)

For the crime of robbery, a defendant has only a limited right to self-defense. " 'When a peace officer or a private citizen employs reasonable force to make an arrest, the arrestee is obliged not to resist, and has no right of self[-]defense against such force. [Citations.] On the other hand, the use of unreasonable or excessive force to make an arrest constitutes a public offense. [Citation.] And all persons have a right to prevent injury to themselves by resisting a public offense." (*People v. Adams* (2009) 176 Cal.App.4th 946, 952.) Accordingly, a defendant may defend himself against excessive force if he reasonably believes he is in imminent danger of suffering bodily injury. (*Ibid.*)

Here, there was no substantial evidence supporting an instruction on self-defense and it was inconsistent with defendant's theory of the case. Initially, defendant did not posit the defense that he had to defend himself from Brown's excessive force and that he feared imminent bodily injury. Defendant insisted that Brown lied about all the events

that transpired that day; no force was used by defendant to defend himself. In fact, he insisted that Brown was lying about defendant pushing him and biting him.

Moreover, the evidence established that defendant pushed Brown out of the way in order to escape with the flashlight. Even if the jury had disbelieved Brown's testimony, and found that the force was defendant biting Brown after being tackled in attempt to get away, this did not entitle him to a self-defense instruction. Brown was entitled to use reasonable force to detain defendant and defendant had no right to resist in self-defense. (§ 490.2, subd. (f)(2).) Brown tackled defendant and held him but there was no evidence of excessive force or imminent danger of bodily injury. The only evidence presented to the jury was that Brown tackled defendant to keep him from leaving and that Brown let defendant back up to return to the store. That defendant suffered some injuries when he fell did not support that Brown used excessive force or that defendant had to bite Brown because of his fear of imminent bodily injury.

The evidence does not establish that defendant acted in self-defense. Brown first tried to calmly talk to defendant to have him return to the store. Defendant immediately ran. Brown ran after him, believing he was stealing merchandise from the store. According to Brown, whom the jury could believe, defendant then pushed him. In an effort to detain defendant, Brown tackled defendant and held him on the ground. No evidence of excessive force was presented and Brown was within his rights to detain defendant. The trial court had no sua sponte duty to instruct the jury on actual self-defense.

Defendant further contends that if this court rejects that the trial court had a sua sponte duty to instruct the jury on self-defense, that he received ineffective assistance of counsel due his counsel's failure to request the instruction. An attorney renders ineffective assistance of counsel, and violates the defendant's Sixth Amendment right to counsel, if the defense attorney's performance falls below an objective standard of reasonableness and there is a reasonable probability the defendant would have realized a more favorable result in the absence of counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 689; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

"The scope of a court's duty to deliver instructions requested by the defense is greater than its obligation to instruct the jury sua sponte on the general principles of law applicable to a case. [Citation.] Requested instructions must be delivered 'upon every material question upon which there is any evidence deserving of any consideration whatever.' " (*People v. La Fargue* (1983) 147 Cal.App.3d 878, 886.) "The court may, however, 'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], *or if it is not supported by substantial evidence*.' " (*People v. Hovarter* (2008) 44 Cal.4th 983, 1021, italics added.)

"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

Here, defendant's counsel made a reasonable tactical decision to discredit all of Brown's testimony. Counsel chose to argue that defendant used no force to defend himself and that Brown was lying about how the event unfolded. This was a reasonable, tactical decision. Moreover, as stated, there was no substantial evidence presented to support an instruction on self-defense. Hence, defense counsel may have decided that it would be futile to request the instruction because the evidence did not support the self-defense instruction.

In addition, defendant has failed to show prejudice. The only evidence before the jury was the testimony of Brown that defendant immediately ran from him and that Brown had to tackle defendant in order to detain him. Even had the jury been instructed on self-defense, that would not have changed the jury's verdict.

C. CUMULATIVE ERROR

Defendant insists that the trial court's failure to sufficiently answer the jury's question, as he requested, and failing to sua sponte instruct the jury on self-defense, cumulatively acted to prejudice him.

"Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' [Citation.] When the cumulative effect of errors deprives the defendant of a fair trial and due process, reversal is required." (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.)

In this case, we have found no errors. Moreover, any possible error was harmless under any standard, whether considered individually or collectively. (See *People v. Rogers* (2006) 39 Cal.4th 826, 911.)

D. SENATE BILL 1393

Defendant contends remand for the trial court to exercise its discretion to dismiss his prior conviction (found true pursuant to section 667, subdivision (a)) after the passage of S.B. 1393, effective January 1, 2019, is required. Respondent concedes the amendments are retroactive assuming this case is not final prior to January 1, 2019, but that remand is unnecessary because the trial court would not have exercised its discretion to strike the prior serious felony conviction even if it had the discretion to strike the prior conviction.[1]

1. *RETROACTIVITY*

Effective January 1, 2019, sections 667, subdivision (a) and 1385, subdivision (b) allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. Under the previous versions of these statutes, the court was required to impose a five-year consecutive term for section 667, subdivision (a), prior convictions, and had no discretion to strike any prior conviction of a serious felony for purposes of enhancement of a sentence. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

[1] The People also claim the issue is not ripe because it was raised prior to January 1, 2019; this is no longer an issue.

Defendant contends S.B. 1393 applies retroactively to his case because his case is not final and the amendments to sections 667, subdivision (a) and 1385, subdivision (b) took effect on January 1, 2019. Defendant insists remand for resentencing is warranted.

In *Garcia,* this court noted that "[w]hen an amendatory statute either lessens the punishment for a crime or, as S.B. 1393 does, ' "vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty," ' it is reasonable for courts to infer, absent evidence to the contrary and as a matter of statutory construction, that the Legislature intended the amendatory statute to retroactively apply to the fullest extent constitutionally permissible—that is, to all cases not final when the statute becomes effective." (*Garcia, supra,* 28 Cal.App.5th at p. 972; see also *In re Estrada* (1965) 63 Cal.2d 740, 744-745 ["It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply" including those cases not yet final when the statute becomes effective].)

"In enacting S.B. 1393, the Legislature did not expressly declare that S.B. 1393, or the amendments it makes to sections 667(a) and 1385(b), will apply retroactively to all judgments of conviction which are not final on January 1, 2019, when S.B. 1393's amendments to sections 667 and 1385 go into effect. [Citation.] But the Legislature also did not expressly declare or in any way indicate that it did not intend S.B. 1393 to apply retroactively, and S.B. 1393 is ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes. [¶] Thus, under the *Estrada* rule, . . . it is

appropriate to infer, as a matter of statutory construction, that the Legislature intended S.B. 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when S.B. 1393 becomes effective on January 1, 2019." (*Garcia*, *supra,* 28 Cal.App.5th at p. 973.)

We agree with the reasoning in *Garcia*. Obviously, the judgment in this case is not final. As such, remand for resentencing pursuant to S.B. 1393 is appropriate. (*Garcia*, *supra,* 28 Cal.App.5th at p. 973.)

2. *REMAND FOR RESENTENCING*

The People argue, relying on cases interpreting Senate Bill 620, that resentencing is unnecessary because the record supports that the trial court would not have exercised its discretion to strike the prior conviction even if it had, at the time, sentencing discretion to strike the prior serious felony. Defendant responds that nothing in the record rules out the possibility that the trial court would have exercised its discretion to strike the prior serious felony conviction.

Prior to sentencing, the prosecutor advised the trial court that he had agreed "based upon the totality of the evidence as well as the circumstances that played out during trial" that he was going to move to dismiss one of the prior convictions alleged pursuant to section 667, subdivision (a) and (e)(2)(a), and 1170.12, subdivision (c)(2)(a). Defendant thereafter admitted to the "Three Strikes" prior; the section 667, subdivision (a) prior; and the section 667.5, subdivision (b) prison prior.

Defendant's counsel filed a *Romero* motion,[2] which is not part of the record, but in which defendant apparently requested that the trial court strike his second Three Strikes prior conviction. Defendant's counsel argued that the current offense committed by defendant amounted only to a shoplifting and a longer prison sentence would not remedy his drug problem. Defendant's counsel noted that defendant had a long history of drug convictions, which now amounted to misdemeanors. The trial court noted that defendant had a drug sales conviction, which was not a misdemeanor. Defendant's counsel argued defendant was actually under the influence of drugs when he committed the robbery. Further, defendant had been remorseful and the Three Strikes prior was committed 27 years prior.

Defendant's counsel argued four years in prison was sufficient to punish defendant. The trial court then questioned counsel's calculation because the term for robbery was two, three and five years. The trial court asked about the section 667, subdivision (a) prior and said, "I don't have any discretion to strike that." Defendant's counsel believed it would "go away" if the Three Strikes prior was dismissed. The trial court responded, "No, they're separate, and I have no discretion to strike that."

The People responded that the trial court should deny the request to dismiss the Three Strikes conviction. Defendant had a lengthy criminal record and continued to commit crimes. He had made little progress in treating his substance abuse. Defendant's

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[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

counsel responded that defendant's crimes were not increasing in seriousness and even the robbery was essentially a shoplifting.

The trial court noted "each of you speak the truth to a large extent. And I quarrel none of the assertions either of you say because this is a complex situation. [Defendant]'s past and this current event is complex. It's complex because when I look at all the factors involved—let's start with first and most obvious being the circumstances of the current offense, this is—it's a mixed bag." The trial court first found the current offense was in fact a robbery supported by the evidence. "With that said, I also have to recognize that on the grand scheme of things, that the violence that was used was far less than what you would ordinarily see in other robberies." It noted the Three Strikes prior was a nonviolent offense and was 27 years old.

However, the trial court did note defendant's ongoing criminal activity. "And the past has told me that despite multiple interventions, multiple imprisonments, multiple programs, multiple 'I'm sorries. This will never happen again,' the criminality continues, leading us to today." The trial court then advised the parties it would have struck one of the Three Strike priors had the People not dismissed it. The trial court concluded, "But that leaves us with one strike. And based upon everything I just said, I cannot find adequate justification to strike the remaining prior because of the fact that there has not been any significant break in criminal conduct, especially in light of the fact that there's been multiple imprisonments and release on parole immediately prior to the commission of this offense. [¶] So with great respect to both sides, and even to [defendant], I am going to deny the invitation to strike the remaining prior."

In sentencing defendant, the trial court imposed the low term on the robbery conviction. The trial court exercised its discretion to dismiss the prison prior alleged pursuant to section 667.5, subdivision (b). It then stated, "I am required to impose the five-year enhancement under 667(a) to be served consecutively, and that would equal nine years." It concluded, "I'm striking the punishment of one year, and minutes need to reflect the reason for that. And I believe the nine years at 80 percent is sufficient punishment for the circumstances surrounding this offense, and that the one additional year would not be justified."

The People insist it is clear from the record the trial court would not have exercised its discretion to strike the section 667, subdivision (a) prior based on his continuing and escalating recidivism.

" '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*); accord, *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.) However, if " 'the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.' " (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901.)

In *McDaniels*, the court discussed remand for resentencing after the enactment of Senate Bill 620, which gave trial courts discretion to strike a firearm enhancement under section 12022.53, which previously was mandatorily imposed. (*McDaniels*, *supra*, 22 Cal.App.5th at pp. 424-425.) It concluded that remand was proper because "the record contains no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements. Although the court imposed a substantial sentence on McDaniels, it expressed no intent to impose the maximum sentence. To the contrary, it imposed the midterm for being a felon in possession of a firearm, and it ran that term concurrently to the term for the murder. It also struck '[i]n the interest of justice' four prior convictions it had found true. Thus, nothing in the record rules out the possibility that the court would exercise its discretion to strike the firearm enhancement under section 12022.53, subdivision (d), which doubled McDaniels's total sentence, and then either impose time for one of the stayed lesser firearm enhancements or strike them as well. While we express no opinion on how the court should exercise its discretion on remand, that discretion is for it to exercise in the first instance." (*Id.* at pp. 427-428.)

In *Chavez*, that court also addressed remand for resentencing after Senate Bill 620. It concluded that remand was necessary because the record did not clearly indicate the trial court would have declined to strike the firearm enhancement because "[a]lthough the court expressed its concern regarding [the defendant's] criminal history" and the "senseless' shooting," the court imposed the low term on one of the counts. Further, the court made no comments clearly indicating that the defendant was not the type of person

for whom it would strike the prior firearm enhancement. Remand for resentencing was ordered. (*People v. Chavez*, *supra*, 22 Cal.App.5th at pp. 713-714.)

On the other hand, in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, the court addressed the possibility of remand for resentencing after the *Romero* decision, which determined that courts have discretion to strike Three Strikes prior convictions in the furtherance of justice. (*Id.* at p. 1896.) In that case the appellate court declined to remand for resentencing, "[T]he trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence. It stated that imposing the maximum sentence was appropriate. It increased appellant's sentence beyond what it believed was required by the Three Strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements. Under the circumstances, no purpose would be served in remanding for reconsideration." (*Gutierrez*, at p. 1896.)

The instant case is comparable to *McDaniels* and *Chavez*. Although the trial court did remark that defendant continued to commit crimes despite prior punishment, it sentenced defendant to the low term on the robbery and struck the prison prior found true pursuant to section 667.5, subdivision (b). The trial court stated several times that it mandatorily had to impose the prior conviction pursuant to section 667, subdivision (a). Remand in this case is appropriate because the record provides no "clear indication" that the trial court would decline to exercise its recently conferred discretion to reduce defendant's sentence.

DISPOSITION

The matter is remanded with directions to resentence defendant pursuant to sections 667, subdivision (a) and 1385, subdivision (b) as amended by S.B. 1393. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
Acting P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.